

1-2008

Family Responsibilities Discrimination and the New Institutionalism: The Interactive Process Through Which Legal and Social Factors Produce Institutional Change

Marcy C. Still

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Marcy C. Still, *Family Responsibilities Discrimination and the New Institutionalism: The Interactive Process Through Which Legal and Social Factors Produce Institutional Change*, 59 HASTINGS L.J. 1491 (2008).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol59/iss6/7

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Family Responsibilities Discrimination and the New Institutionalism: The Interactive Process Through Which Legal and Social Factors Produce Institutional Change

MARY C. STILL*

Michael: “Hey, mon!”

Pam: “Hey, you have a bunch of messages . . . Hannah quit while you were gone. I guess she filed a complaint about being a working mother. And so you might also have to be deposed.”

Michael: “Blah blah blah blah . . . Relax . . . I’ll get to all that later.”

Pam: “It’s pretty serious.”

Michael: “Aren’t you going to ask me how Jamaica was? . . .”

Pam: “How was Jamaica?”¹

INTRODUCTION

The above conversation between the politically incorrect Michael Scott and his receptionist is noteworthy not because it reveals how seriously the show’s blundering leader takes employee lawsuits—he could hardly be bothered—but for the fact that he even knows what a “working mother” lawsuit is. His lack of reaction implies a familiarity with, and acceptance of, a new category of discrimination complaint.

The taken-for-granted nature of the reference to the lawsuit can be seen as a cultural artifact indicating normative change—when our television shows about everyday work life casually mention a phenomenon, we can assume it is commonly understood. Another, more

* Assistant Professor, George Washington University, Department of Organizational Sciences and Communications. The Author wishes to thank Joan Williams and Robin Stryker for their intellectual insights and encouragement; Stephanie Bornstein for her patience and support; and former American University law students Melissa Rifkin and Katie Kolan for research assistance.

1. *The Office: Back From Vacation* (NBC television broadcast Jan. 4, 2007).

sober indicator of change is the United States Equal Employment Opportunity Commission's (EEOC) issuance of the Enforcement Guidance for employers on the subject of family responsibilities discrimination (FRD).² The formal legal Guidance, disseminated by a large and influential government agency, confers legitimacy on the social problem of discrimination against family caregivers, and is likely to be an important step in the iterative process leading to social and legal change in the United States.

But are these two widely divergent pieces of evidence indicative merely of the attention of a few writers and government attorneys to a provocative—but perhaps faddish—legal idea? In this Article, I contend that there is considerable evidence that social change is occurring beyond these disparate markers, and that social theory strongly suggests that institutional conditions are ripe for meaningful organizational change in the next several decades.

The Article proceeds as follows: Part I explores evidence that normative and legal shifts have occurred with regard to motherhood and employment; Part II argues that a confluence of intellectual, cultural and material factors has driven the observed change; and Part III uses the lens of the sociological theory of “new institutionalism” to examine how FRD compares to other legal changes that have put pressure on employers to alter their practices, in particular the evolution of Title VII,³ sexual harassment law, and the Family and Medical Leave Act (“FMLA”).⁴

I. INDICATORS OF SOCIAL AND LEGAL CHANGE

In this Part, I present data suggesting that there has been a substantial transformation in the framing, litigation, and perception of the “problem” of motherhood, and work in the last quarter century.⁵ I consider four types of indicators: *normative*, *legal*, *behavioral*, and *structural*.

A. THE INDICATORS, MEASURES, DATA SOURCES AND FINDINGS

Normative change. Changes in commonly held beliefs about appropriate roles, behaviors and categories are thought of as normative. The example at the opening of the Article of a new, taken-for-granted category of lawsuit is an example of normative change. Its legitimacy as a

2. *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, 2 EEOC Compl. Man. (BNA) § 615 (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.pdf> [hereinafter *EEOC Guidance*].

3. 42 U.S.C. § 2000e (2006).

4. 29 U.S.C. §§ 2601–2654, 5 U.S.C. §§ 6381–6385 (2006).

5. The conversation about discrimination against family caregivers is largely dominated by ideas about motherhood, and I often refer to it as such.

category of lawsuit is not questioned. To measure normative change in regard to FRD, ideally one would examine public awareness and beliefs specifically about such lawsuits. Unfortunately, such data do not exist to date. An acceptable substitute can be found in public opinion polls related to mothers and work. A key assumption underlying FRD is that workers who have family responsibilities deserve to work and are not inferior workers. I draw on opinions about the appropriateness of women assuming nonhomemaker roles in society and mothers working as indicators of shifting societal norms.

A second normative indicator is drawn from media accounts of the “problem” of mothers in the workforce. Social movement theory tells us that cultural framing and reframing often precede successful change efforts.⁶ Frames are “schemata of interpretation” that make life experiences or events meaningful and that guide action.⁷ Early frames about women and work drew on social justice and women’s equality to argue that organizations should keep women in the workforce through childbearing years by accommodating their “differences.”⁸ This accommodation frame has remained the dominant lens through which work/family issues have been publicly viewed. I consider evidence from the popular press of alternative framing.

Legal change. The second type of indicator of social change concerns shifts in the legal domain. Increased activity in the courts is one piece of evidence that shifting norms and expectations are clashing with one another and producing conflicts that cannot be resolved through normal procedures. I examine trends in the filing of lawsuits in which workers with family responsibilities claim to be discriminated against as an indicator that the legal profession is taking such claims more seriously.

A second piece of evidence related to legal change is examined qualitatively through the analysis of key legal decisions. I discuss three decisions that reveal shifts in legal thinking and influences from legal advocates.

6. David Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 466 (1986).

7. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview*, 26 ANN. REV. SOC. 611, 614 (2000).

8. Joan Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 813–14 (1989).

TABLE A: INDICATORS AND MEASURES OF CHANGE

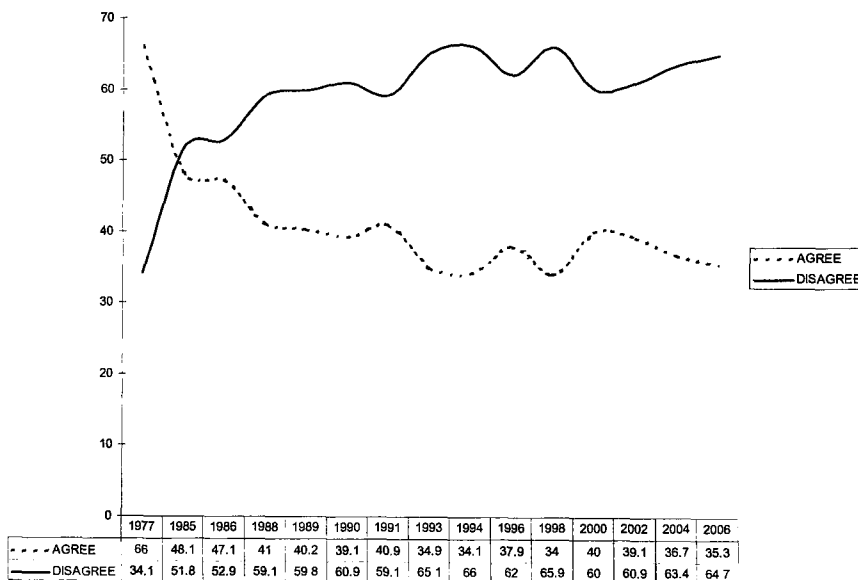
TYPE OF CHANGE	VARIABLE TYPE	OPERATIONALIZATION	SOURCE	FINDING
CULTURAL (NORMATIVE)	Public opinion survey	Degree of support for breadwinner/homemaker family form	General Social Survey (GSS)	Support for superiority of traditional family form has declined
		Degree of support that mothers should stay home with preschool children	GSS	Support for mothers staying at home has declined
		Degree of support that mothers' labor force participation hurts children	GSS	Belief that children are harmed when mothers work has declined
	Problem framing	Content analysis of media	Newspapers, magazine articles (ProQuest)	Increasing number of articles using discriminatory framing
LEGAL	Lawsuits (archival)	Count of the number of lawsuits involving family responsibilities discrimination	Lexis/Nexis; Westlaw	Increase of nearly 400% in number of filings
	Media coverage in legal profession	Count of the number of articles in the legal press	Legal media articles (ProQuest)	Trend toward increased attention
	Court decisions	Qualitative analysis of key legal decisions	Lexis/Nexis	Decisions sympathetic to growing social scientific evidence of stereotyping; gender as a set of cultural expectations

B. DISCUSSION OF CHANGE INDICATORS

Normative/cultural changes. Figures 1, 2, and 3 below depict shifting public opinion about appropriate activities for women and mothers. The three figures together all point to a clear story: since the 1970s, Americans have adopted more egalitarian views of marriage and women's workforce participation. Figure 1 shows that the majority

opinion about the appropriate family form (breadwinner/homemaker) reversed over the time period; initially 66% supported such a distinction and 34% did not, while in 2006, 65% did not support it and 35% did.

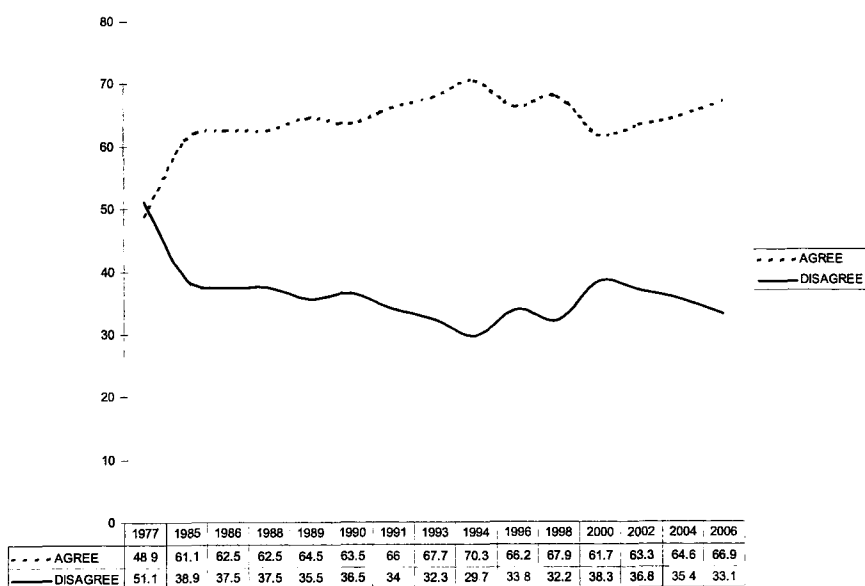
FIGURE 1: PERCENTAGE OF AMERICANS WHO AGREE OR DISAGREE WITH THE STATEMENT THAT MEN SHOULD WORK AND WOMEN SHOULD TAKE CARE OF THE HOME, 1977–2006⁹



9. James Allan Davis & Tom W. Smith, National Opinion Research Center, General Social Surveys, 1972–2006 (machine-readable data file) (Roper Center for Public Opinion Research, Univ. of Conn., 2007), <http://www.norc.org/GSS+Website> (last visited June 1, 2008).

Figure 2 shows that opinions of the effect of mothers' working on children shifted from equal numbers of Americans agreeing as disagreeing with the statement that children are not harmed, to 67% agreeing that children are not harmed.

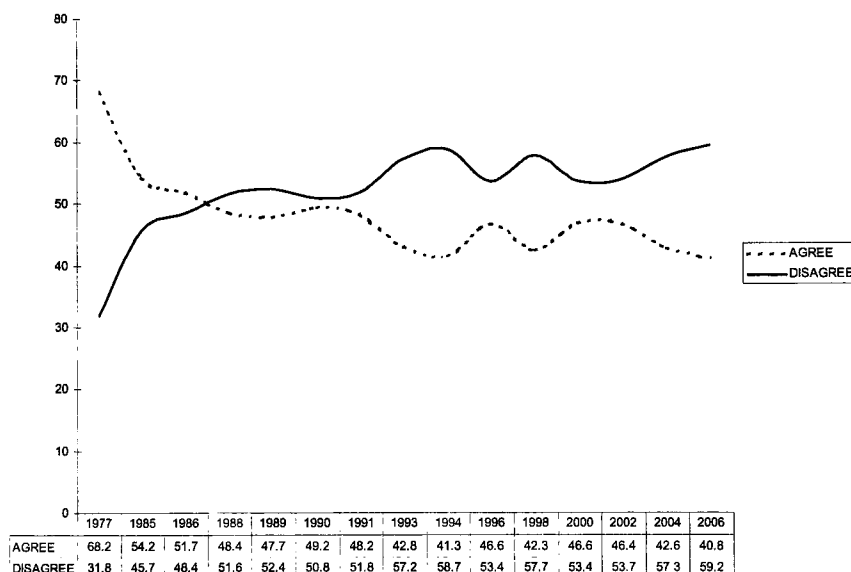
FIGURE 2: PERCENTAGE OF AMERICANS WHO AGREE OR DISAGREE WITH THE STATEMENT THAT CHILDREN ARE NOT HARMED IF THEIR MOTHERS WORK¹⁰



10. *Id.*

Perhaps a more conservative test of opinions about the effects of mothers' working is shown in Figure 3, where respondents were asked about advantages for children if mothers stay home rather than about harm. The graph depicts a clear decline in support for the notion that children are better off if their mothers do not work. Initially, the majority (68%) agreed with the statement while 32% disagreed; by 2007, the majority (59%) disagreed while 41% agreed.

FIGURE 3: PERCENTAGE OF AMERICANS WHO AGREE OR DISAGREE WITH THE STATEMENT THAT PRESCHOOL CHILDREN ARE BETTER OFF IF THEIR MOTHER DOESN'T WORK¹¹



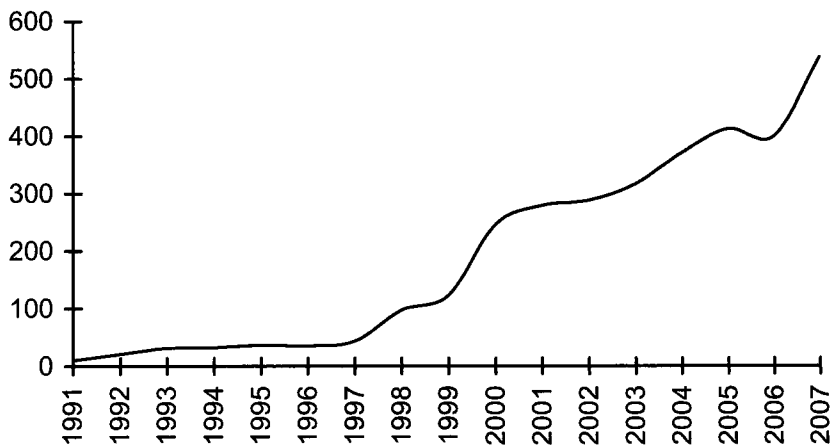
Turning now to the reframing of the issue of work/family conflict, Figure 4 depicts this framing shift. Using the article database ProQuest, I searched for all articles with the subjects "work-life balance" and "discrimination." The results show a marked increase in such framing in 2000, the year Joan Williams published her book *Unbending Gender*, which persuasively built a case that work policies or practices designed around masculine norms and ideals discriminated against women and

11. *Id.*

particularly mothers;¹² the number of articles mentioning discrimination in relation to work/family conflict doubled that year from 123 to 246. The second spike occurred between 2006 and 2007, when Williams testified on FRD before the EEOC, and the agency issued its Enforcement Guidance.

Instead of “reframing,” perhaps it is more accurate to suggest that Williams’s argument offered an *alternative* frame for work/family conflict. The dominant frame in work/family scholarship, the media, and the professions, was one of accommodation. That frame has not been dismantled; the two frames, discrimination and accommodation, now coexist.

FIGURE 4: NUMBER OF PRESS ARTICLES JOINTLY MENTIONING WORK-LIFE BALANCE AND DISCRIMINATION, 1991–2007¹³

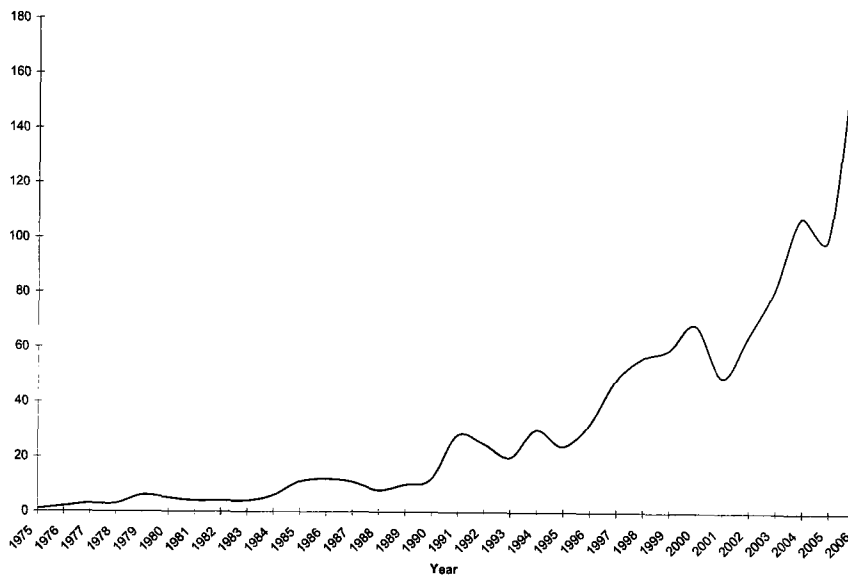


12. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2000).

13. Original data compiled March, 2008, by searching press articles using ProQuest Database, <http://www.proquest.com/proquest>.

Legal changes. Figure 5 depicts the dramatic increase in FRD case filings from 1975 to the present. This trend counters the overall trend in employment discrimination filings, which shows a stable if slightly declining trend in the last fifteen years.¹⁴ As an indicator of change, increasing lawsuits suggest normative shifts that lead to disputes on the one hand, but also an increasing legitimacy of such lawsuits in the legal profession, which serves as a gatekeeper for access to the courts.

FIGURE 5: NUMBER OF FRD FILINGS, 1975–2006¹⁵

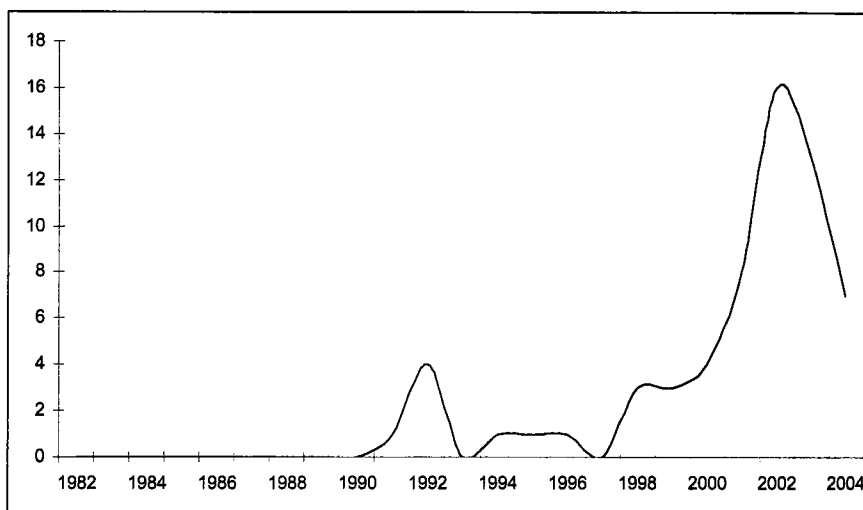


14. See Administrative Office of the U.S. Federal Courts, Federal Judicial Caseload Statistics, <http://www.uscourts.gov/caseloadstatistics.html> (last visited June 1, 2008).

15. Original data compiled March, 2008, from cases collected by the Center for WorkLife Law. See also Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRd": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1336 (2008); MARY C. STILL, *LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES* 6–7 (2006), available at <http://www.worklifelaw.org/pubs/FRDreport.pdf>.

A second indicator of legal shifts can be found in the number of articles in the legal press covering cases. Figure 6 shows the general trend toward increasing coverage of such cases; media coverage imparts information, spurs public conversations and debates, and diffuses litigation tactics.

FIGURE 6: LEGAL MEDIA COVERAGE OF HIGH PROFILE FRD CASES¹⁶



A third indicator of legal change is reflected in legal decisions. I discuss the two most significant cases here, but a handful of others have been identified as important.¹⁷ The first case, *Nevada Department of Human Resources v. Hibbs*,¹⁸ was a U.S. Supreme Court case that linked gender stereotypes with sex discrimination, a connection several legal theorists had been making for some time. In *Hibbs*, the Supreme Court held that a state employee fired while caring for his wife, who had been critically injured in a car accident, could sue his employer for money damages under the Family and Medical Leave Act ("FMLA").¹⁹ The case was important because of its high profile (most were surprised by Chief

16. Original data compiled March, 2008, by searching press articles using ProQuest Database, <http://www.proquest.com/proquest>. See STILL, *supra* note 15, at 17.

17. See Joan C. Williams, Statement Before the EEOC: Perspectives on Work/Family Balance and the Federal Equal Employment Opportunity Laws (Apr. 17, 2007) (transcript available at <http://www.eeoc.gov/abouteeoc/meetings/4-17-07/williams.html>) (describing key court decisions advancing FRD litigation).

18. 538 U.S. 721 (2003).

19. *Id.* at 725-26, 740.

Justice Renquist's departure from federalism doctrine²⁰), and because, even though it was not a discrimination case, it expressly linked underlying gender stereotypes of mothers as less committed to work to illegal treatment based on the expectations embodied in those stereotypes.²¹

The second case, *Back v. Hastings on Hudson Union Free School District*,²² drew on advances in social scientific research on cognitive bias in ruling that the defendants evidenced stereotyped performance expectations of Elana Back, a school psychologist, upon her return from maternity leave.²³ The case was legally significant for its ruling that plaintiffs asserting such discrimination claims should not have to bring evidence that they were treated worse than similarly situated fathers, a requirement of such cases that historically had been an obstacle to their progress in the courts.²⁴

II. CAUSES OF SOCIAL AND LEGAL CHANGE

In this Part, I argue that the observed social and legal changes previously described were caused by a complex interaction of numerous actors. Figure 7 presents a theoretical model of this interactive process. In the model, demographic changes such as women's labor force participation and increasing educational attainment lead to normative shifts about "appropriate" behavior and also directly lead to increased lawsuits being filed. Normative shifts in turn affect the legal domain through clashes between old and new norms. And the resource environment directly leads to increased activity related to women and work, through academic centers, media attention, and networking opportunities, which directly leads to employer change and to legal shifts, as groups mobilize. Legal shifts, most notably the EEOC Enforcement Guidance,²⁵ predict change in employer behavior. Finally, it is important to note the *recursive* effects in the model. Employer change has feedback mechanisms—new practices will in turn be evaluated in future court decisions and will lead to changing worker norms.

20. See Joan C. Williams, *Hibbs as a Federalism Case; Hibbs as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 365–66, 370 (2004).

21. *Id.* at 725, 736 ("Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.").

22. 365 F.3d 107 (2d Cir. 2004).

23. *Id.* at 125.

24. *Id.* at 124; see Williams & Bornstein, *supra* note 15, at 1351.

25. EEOC Guidance, *supra* note 2.

**FIGURE 7: CAUSES AND EFFECTS OF FAMILY RESPONSIBILITIES
DISCRIMINATION: THE COEVOLUTION OF LAW, SOCIETY, AND
ORGANIZATIONS**

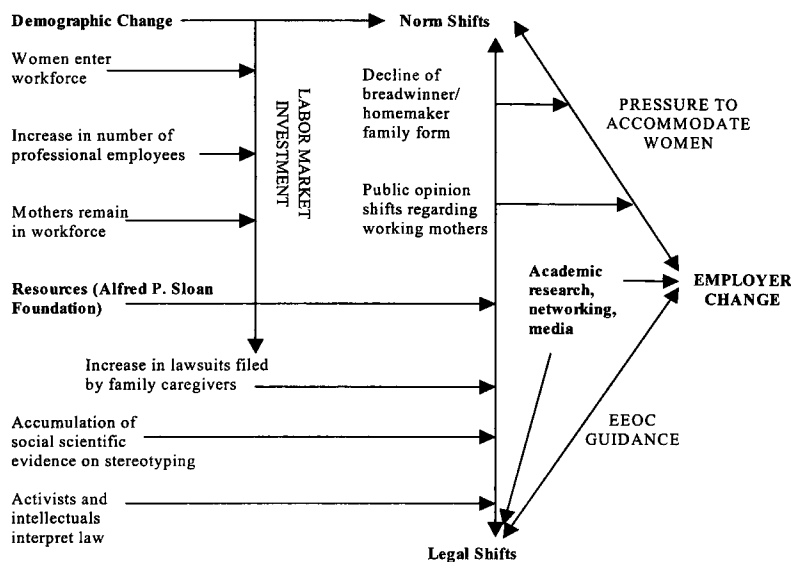


Table B below details the hypothesized causal factors, their operationalization, measurement, data sources, and findings.

TABLE B: HYPOTHESIZED CAUSES OF CHANGE

TYPE OF CHANGE	VARIABLE TYPE	OPERATIONALIZATION	SOURCE	FINDING
CULTURAL	Demographic (survey)	Mothers' labor market participation	Census of Population Surveys (CPS)	Mothers' participation dramatically increasing
		Women's educational attainment	CPS	Women's educational status increasing
LEGAL	Demographic (survey)	Qualitative analysis of legal framing of FRD	Review of legal and academic articles	Reframing of issue; incorporation of cognitive bias research strengthens argument for promise of Title VII for resolving work/family conflict
SOCIAL STRUCTURAL/ SOCIAL MOVEMENT	Intellectual history	Qualitative analysis of linkages amongst women's movement organizations, intellectuals, Alfred P. Sloan Foundation	Groups' websites, media accounts	Connections increase between academic, activist groups
	Historical/archival			

Demographic change. The growth in women's labor force participation in the second half of the twentieth century is a well-documented phenomenon; much of that increase can be ascribed to mothers' increased labor force attachment.²⁶ As it has become increasingly common for mothers to be in the workforce, norms against their labor market participation have eroded, as evidenced in Figures 2 and 3.²⁷ Additionally, women's increasing investment in education—more women than men now receive bachelor's and master's degrees²⁸—

26. U.S. DEPT. OF LABOR, *WOMEN IN THE LABOR FORCE: A DATABOOK*, Report 985 (2005), available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/b6/aa.pdf; see *infra* fig.8 (documenting increase in labor force participation of mothers from 47% in 1975 to 70% in 2004).

27. See Davis & Smith, *supra* note 9.

28. U.S. DEPT. OF EDUC. & NAT'L CTR. FOR EDUC. STATISTICS, *POSTSECONDARY INSTITUTIONS IN THE*

suggests that women's investments in their human capital are greater than ever.

Increasing labor market investments and decreasing stigma against working mothers lead economists and sociologists alike to predict an increasing number of women making a "choice" to remain in the labor market. Once there, however, women encounter work environments designed for men's life patterns and bodies,²⁹ a situation of "institutional lag."³⁰

Sociologists refer to demographic causes of normative flux as "compositional" effects: as the composition of individuals changes, the existing norms, rules or practices are likely to become less appropriate or efficient.³¹ In the language of legal change theorists, such demographic shifts create an increase in "underlying activity," resulting in potential increases in litigation surrounding that activity.³²

UNITED STATES: FALL 2003 AND DEGREES AND OTHER AWARDS CONFERRED: 2002-03 (2005), available at <http://nces.ed.gov/pubs2005/2005154.pdf> [hereinafter DEGREES AND AWARDS].

29. WILLIAMS, *supra* note 12, at 108.

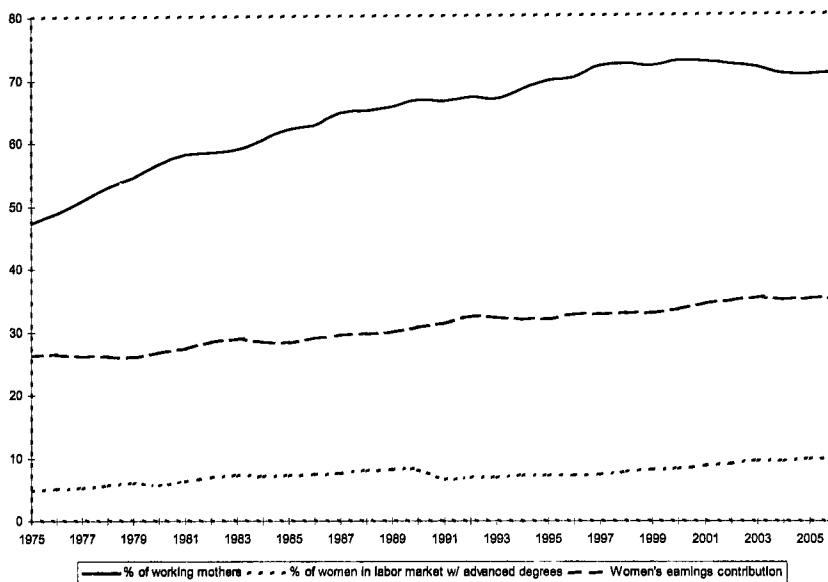
30. See PHYLLIS MOEN & PATRICIA ROEHLING, THE CAREER MYSTIQUE: CRACKS IN THE AMERICAN DREAM 20, 128 (2004) (referring to the gap between social or demographic patterns and appropriate structures and policies responding to such changes).

31. See, e.g., Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 965-90 (1977).

32. Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC'Y REV. 371, 373-74 (1990).

Figure 8 shows three indicators of women's increasing investment in the workforce. All three indicators increase over time, though the steepest growth is in the percentage of mothers who remain in the labor force.

FIGURE 8: DEMOGRAPHIC TRENDS IN WOMEN'S WORK FORCE PARTICIPATION, EMPOWERMENT, AND EDUCATIONAL ATTAINMENT³³



Legal change. Figure 5 showed one key indicator of legal change—the recent dramatic increase in lawsuits filed by mothers and other workers with family responsibilities. What has led to such an increase in FRD complaints? Anecdotally, one direct cause suggested was that women had made greater investments in human capital and were, therefore, less willing to abandon their investments; when they felt discriminated against at work because of their parenting status, rather than quit, they protested. Other causal factors are more complex and involve the interaction of numerous social actors. Below, I discuss the evolution of legal thought and two key sparks in ending the theoretical deadlock that held until the early 2000s: reframing the issue of work/family conflict and incorporating findings from a maturing academic research stream.

33. U.S. DEPT. OF LABOR, *supra* note 26; DEGREES AND AWARDS, *supra* note 28; see STILL, *supra* note 15, at 15–18.

A. THE EVOLUTION OF LEGAL THOUGHT: FRAMING FRD AS AN ISSUE OF WORKERS' RIGHTS, FAMILY VALUES

In 1985, feminist legal scholar Reva Siegel proposed that Title VII could be used to litigate work/family issues.³⁴ In 1989, Joan Williams published *Deconstructing Gender*, an article that criticized "sameness" feminist conceptions of gender equality as being about the necessity for men and women to be treated as if they were the same, as well as "difference" feminists who "celebrate a women's culture that encourages women to 'choose' economic marginalization and celebrate that choice as a badge of virtue."³⁵ In *Deconstructing Gender*, one of the most-cited law review articles in the field, Williams developed critiques of the *institutionalization* of gender and argued that Title VII held promise for resolving work/family conflicts once an understanding of how gender norms in market work become rule-like, based on underlying stereotypes of gender-appropriate behavior.³⁶ She suggested that feminists ought to turn their attention away from issues of sexual domination that had occupied both theoretical and policy efforts (pornography, violence against women) and toward economic domination and restructuring wage labor.³⁷

It is perhaps no surprise that Williams alienated feminists, since she criticized both sameness and difference camps. Prominent legal theorist Kathy Abrams argued that Title VII would fail to redress the experiences of mothers, since businesses could easily argue their practices were necessary to ensure efficiency and survival.³⁸ Her focus was strictly on Title VII's disparate impact theory.³⁹ In a later review of Williams' *Unbending Gender*, Abrams continued to be unswayed by the argument that litigation would solve the problem of the maternal wall.⁴⁰ Other feminist legal theorists concurred.⁴¹

If the legal and feminist communities were less than welcoming, the work/family community embraced Williams' ideas.⁴² The work-life

34. Reva Segal, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 940 (1985).

35. See Williams, *supra* note 8, at 798.

36. *Id.* at 819, 839.

37. *Id.* at 829-32.

38. Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1224 (1989).

39. *Id.* at 1226.

40. Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 754-66 (2000) (book review).

41. See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1517 (2001); Laura Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of the Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 375 (2001).

42. In the interest of full disclosure, while a graduate student, the Author attended a conference of Sloan academic research centers in which Williams, newly funded by Sloan, declared to a panel

“movement,” as some have depicted it, was struggling for ways to stay in the public eye. Its greatest success to date, passage of the FMLA, had occurred some seven years before.⁴³ Although the Alfred P. Sloan Foundation’s initiation of a work/family program had infused tremendous capital into the problem, the field’s fundamental message of work/family balance and accommodating women’s labor market participation with programmatic benefits seemed dated. In 2002, at a conference organized by the Families and Work Institute, a think tank organization with funding from corporate America and the Sloan Foundation, work-life leaders brainstormed about how to reframe the issue.⁴⁴ The leaders observed that work-life conferences were losing attendance, that companies were devoting fewer resources to work-life programs, and that work-life business cases were not influential.⁴⁵ Amongst solutions were finding a new language for the field, integrating advocates from other fields, and turning work-life into a political issue.⁴⁶

The Sloan Foundation’s work-life program officer, Kathleen Christensen, approached Williams about providing support for her research and advocacy. One key feature of that early support was the formation of a group of social scientists involved in research related to cognitive bias against women and mothers. The “Cognitive Bias Working Group” brought these scholars together, produced a special sociological journal on the maternal wall, and, perhaps most importantly, provided the necessary theoretical linkage between stereotyping, or “unconscious” bias, and discrimination against employees with family responsibilities.⁴⁷ Social psychological experiments revealing judgments of mothers as “warm” and “nurturing” but “incompetent” connected with legal scholars’ contention that the workplace conformed to masculine norms and in so doing, treated individuals who did not conform to those norms as second-class citizens.⁴⁸ This new framework, rolled out in a press

audience that a story about a mother being penalized at work for family conflicts was “actionable”—a term most social scientists were unfamiliar with. The Author later worked for Williams’ Center for WorkLife Law.

43. Family and Medical Leave Act (FLMA) of 1993, 29 U.S.C. §§ 2601–2654, 5 U.S.C. §§ 6381–6385 (2008).

44. BETTYE H. PRUITT & RHONA RAPOPORT, LOOKING BACKWARDS TO GO FORWARD: A TIMELINE OF THE WORK-FAMILY FIELD IN THE UNITED STATES SINCE WORLD WAR II 43 (2003) available at <http://wfnetwork.bc.edu/timelines/other/PRtimeline.pdf> (“A conference organized by Families and Work Institute and held (May 2002) in conjunction with a semi-annual meeting of the Work-Life Leadership Council of the Conference Board—‘Work-Life Issues in the United States: Past, Present, and Future: The Legacy Meeting’—brings together 32 participants from the work-life field to discuss the past, present, and future of the field, overlapping with the meeting of the council.”).

45. *Id.*

46. *Id.*

47. See Monica Biernat, Faye J. Crosby & Joan C. Williams eds., *The Maternal Wall: Research and Policy Perspectives on Discrimination Against Mothers*, 60 J. SOC. ISSUES (SPECIAL ISSUE) 667 (2004).

48. See Faye J. Crosby, Joan C. Williams & Monica Biernat, *The Maternal Wall*, 60 J. SOC. ISSUES

conference in Washington, D.C. in 2002, garnered attention from major media outlets, and reframed the work-life debate from one about how to accommodate women through benefits such as flexible scheduling to how employers could ensure the rights of employees to work *and* parent without being discriminated against.⁴⁹

In an interview with the *New York Times*, Williams ascribes the traction of FRD despite resistance from the legal field as a matter of finding the right metaphor.⁵⁰ She recalls persuading colleagues: "I said to them: 'You're thinking of these as very edgy gender-discrimination cases. In fact, they're family-values cases.'"⁵¹

Social structural change. Social problems, change frames, solutions, and resources flow through social space and are brought together by networks, both personal and interorganizational. The late 1990s and early 2000s saw the maturation of relationships, some of which were initially spurred by networking opportunities and resources through the Alfred P. Sloan Foundation,⁵² as well as through personal networks. Linkages formed or matured between activist groups such as the National Partnership for Women and Families, the Institute for Women's Policy Research, and the National Council for Women's Organizations and Sloan's research centers at universities such as the University of Chicago, Cornell, MIT, and Berkeley, as well as hybrid research and policy organizations such as the Families and Work Institute and the New America Foundation.⁵³ Sloan provided the means for the creation of a website devoted to the accumulation of work/family research, as well as policy and law updates, a newsletter, and regular conferences.⁵⁴

In 2003, the *New York Times Magazine* featured an article titled "The Opt-Out Revolution" which ignited women's groups in protest

675, 678–80 (2004); Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. Soc. ISSUES 701, 712–13 (2004).

49. See Press Release, AU News, HELP WANTED: Unlimited Potential for Advancement: Moms Need Not Apply—AU Law Program on Gender Work and Family Report Shows More Parents Suing Employers for Discrimination (Aug. 23, 2002), available at <http://domino.american.edu/AU/media/mediareel.nsf/1D265343BDC2189785256B810071F238/549B25380D74C5A785256C1E005292E4?OpenDocument>. The Program on Gender, Work & Family at American University Washington College of Law, founded by Joan Williams, later changed its name to The Center for WorkLife Law in October 2003. See Ctr. for WorkLife Law, About Us, <http://www.worklifelaw.org/AboutUs.html> (last visited June 1, 2008).

50. Eyal Press, *Family-Leave Values*, N.Y. TIMES MAG., July 29, 2007.

51. *Id.*

52. See Kathleen Christensen, History of the Work Place, Work Force, and Working Families, http://www.sloan.org/programs/Working_Families_History.shtml (last visited June 1, 2008); Sloan Workplace, Workforce and Working Families Program, FamilyWork: Creating Family Friendly Work, available at <http://www.sloan.org/programs/documents/FamilyworkBrochure2004.pdf> (last visited June 1, 2008).

53. See sources cited *supra* note 52.

54. See sources cited *supra* note 52.

because it profiled educated professional women who chose to leave the job market and raise children.⁵⁵ New capabilities for rapid organizing via the internet made it easy for organizations to form and for existing organizations to link to one another and coordinate action, most recently in their effort to pass sick leave legislation.⁵⁶ New grassroots groups include Mothers Movement Online, Mainstreet Moms, Mothers Acting Up, and Mothers & More (which reinvented itself and gained visibility online).⁵⁷

The most high profile of these new organizations, MomsRising, was founded in 2006 by Joan Blades, who had previously started *moveon.org*, an online political activist network that effectively used the new Internet medium to mobilize collective action.⁵⁸ According to its website, MomsRising has more than 140,000 members around the nation and is affiliated with eighty-five other like-minded organizations.⁵⁹ Using tactics such as “house parties,” in which women invite friends to their homes to view a documentary on the state of women and work in the United States, as well as techniques now common to political action websites such as the circulation of petitions, organizing campaigns in favor of or opposed to legislation, collecting donations and blogging about newsworthy topics, the organization is devoted to making a family-friendly working America.⁶⁰ Unlike academic research centers devoted to work-life issues that are dependent on the Sloan Foundation, and lobbying organizations dependent on a limited amount of Washington money, MomsRising’s business model is that of a democratic, populist organization, and its high profile makes it an ideal central node in the mothers’ movement network.

55. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 29, 2003.

56. See, e.g., National Partnership for Women and Families & Healthy Families Act Coalition, Support Paid Sick Days, http://paysickdays.nationalpartnership.org/site/PageServer?pagename=psd_index (last visited June 1, 2008).

57. See Mothers Movement Online, About the MMO, <http://www.mothersmovement.org/site/about.htm> (last visited June 1, 2008); Mainstreet Moms, About the MMOB, <http://www.themmob.org/about.html> (last visited June 1, 2008); Mothers Acting Up, History & Principles, <http://www.mothersactingup.org/history&principles.html> (last visited June 1, 2008); Mothers & More, History, <http://www.mothersandmore.org/AboutUs/history.shtml> (last visited June 1, 2008).

58. See MomsRising.org, About MomsRising, <http://www.momsrising.org/aboutmomsrising> (last visited June 1, 2008) [hereinafter MomsRising]; Kara Jesella, *Mom's Mad. And She's Organized*, N.Y. TIMES, Feb. 22, 2007, available at http://www.nytimes.com/2007/02/22/fashion/22mothers.html?_r=1&ei=5070&en=aaa37b2925949e14&ex=1173675600&pagewanted=all.

59. See MomsRising, *supra* note 58.

60. See *id.*

III. NEW INSTITUTIONALISM AND THE PROMISE OF LASTING ORGANIZATIONAL CHANGE

Organizations attend to law and threats of legal change, since their actions must be lawful for them to maintain their legitimacy in society.⁶¹ But law can be ambiguous and can create uncertainty for organizations, which seek to minimize uncertainty and maximize their reputations.⁶² In new institutionalist theory, organizations are not passive in their monitoring of laws affecting their functions.⁶³ Indeed, they are one of a number of actors that mutually construct law and determine its enactment.⁶⁴

In this Part I summarize new institutionalist accounts of the interpretive, interactive process through which social actors mutually construct law and organizational compliance in regard to Title VII, sexual harassment, and the FMLA. I compare these accounts to the present conditions surrounding FRD and evaluate similarities and differences that might promote or impede meaningful organizational change.

A. TITLE VII: SOCIAL MOVEMENT ACTORS INFLUENCE THE LAW

From all appearances, Title VII was a weak statute with an even weaker enforcement agency that might have been strictly ceremonial but for the interaction of EEOC attorneys and civil rights groups, which pushed the agency to expand Title VII's reach to cover practices whose present *effects* reproduced past discrimination.⁶⁵ Civil rights activists, the EEOC, and the federal courts that sided with EEOC interpretations interacted to interpret and shape law, helping to do away with seniority systems and job testing practices that kept black people from advancing.⁶⁶ In asserting a broadened definition of Title VII, the EEOC influenced the Supreme Court's influential *Griggs v. Duke Power Co.* ruling that eliminated harmful intent as the standard for employment discrimination cases.⁶⁷ The Supreme Court's adoption of the EEOC's interpretation made the agency an unexpected influential actor. Without social

61. See generally Walter W. Powell & Paul DiMaggio, *Introduction to THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 1, 1-40 (Walter W. Powell & Paul DiMaggio eds.) (1991) (contending that legitimacy is a key resource that organizations must have to function).

62. John R. Sutton et al., *The Legalization of the Work-Place*, 99 AM. J. SOC. 944, 946-51 (1996).

63. *Id.*

64. *Id.*

65. See Nicholas Pedriana & Robin Stryker, *The Strength of a Weak Agency: Early Enforcement of Title VII of the 1964 Civil Rights Act and the Transformation of State Capacity, 1965-71*, 110 AM. J. SOC. 709, 712-14, 738-47 (2004) (arguing that the EEOC transcended a lack of resources, organization, and leadership to shape discrimination law).

66. *Id.* at 727-40.

67. 401 U.S. 424, 432 (1968).

movement pressure from below, the agency might never have achieved such legitimacy.⁶⁸

Despite giving Title VII “teeth” through a broadened interpretation of the law, businesses generally responded by demonstrating their compliance with as little disruption as possible.⁶⁹ In practice, this led to the adoption of symbolic structures such as offices, positions, rules and procedures.

B. SEXUAL HARASSMENT: HUMAN RESOURCE PROFESSIONALS INTERPRET THREAT, INFLUENCE ADOPTION OF “PREVENTIVE” PRACTICES

Court decisions in 1976 and 1977 allowed acts of sexual harassment to be considered discrimination;⁷⁰ in 1980, the EEOC’s Guidance recommended companies develop “appropriate sanctions.”⁷¹ Human Resources (H.R.) professionals, according to Dobbin and Kelly, took that language as a cue to enact common H.R. tools, training and grievance programs.⁷² The authors analyze case decisions to show that there was never any suggestion from the courts that such programs would inoculate companies from liability, but that H.R. managers overstated litigation threats and persuaded executives to proactively protect themselves.⁷³ Legal professionals, on the other hand, were more cautious and recommended immediate response if harassment claims were levied, as well as working with an attorney to resolve the situation.⁷⁴ Executives largely ignored this more cautious advice.⁷⁵ Despite the fact that there was little or no evidence that such programs reduced harassment in organizations, nor that the courts would look more favorably on those that had such programs in place, companies adopted the practices rapidly, especially in periods following high profile legal cases.⁷⁶ Here, then, the evidence supports the institutionalism idea that companies sometimes go beyond legal requirements in enacting new practices; in many cases such as in the case of sexual harassment, the practices are more symbolic than substantive.

68. Pedriana & Stryker, *supra* note 65, at 742.

69. Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531, 1535 (1992).

70. See Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1208 (2007) (discussing *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), and three unnamed 1977 federal court cases).

71. See *id.* at 1210 (showing that Human Resources professionals promised training and grievance programs would protect organizations from liability).

72. *Id.*

73. *Id.* at 1211.

74. *Id.* at 1204.

75. *Id.* at 1205.

76. *Id.* at 1211.

C. THE FMLA: LAW AS A RESOURCE FOR RENEGOTIATING MEANING

The introduction of a new law protecting workers' rights, such as the FMLA, creates conditions for contestation, which in turn holds promise for changing organizational institutions.⁷⁷ Catherine Albiston's interviews with workers who successfully negotiated contested leaves revealed that even laws conferring rights, such as the FLMA, are evaluated within the institutionalized activities and expectations of a company.⁷⁸ For example, conceptions about work and the "good worker" as someone always available to the company, initially dampened uptake of FMLA.⁷⁹ But "agents of transformation"—opponents, friends, co-workers, family members—influenced workers' cultural frames, as well as the possible set of solutions.⁸⁰ Agents of transformation employed cultural discourses that gave meaning to employees' work life. In her interviews, Albiston found that employees wanting family leave were often influenced by transformative agents in the action they took.⁸¹ Such individuals might simply have informed them of their legal rights, rights which companies keep quiet; knowledge of these rights helped employees reframe their requests in legal or moral terms.⁸² Even knowledge of worker rights, however, was sometimes not enough to overcome cultural norms and expectations that underlie employee-employer interaction.⁸³ Albiston gives the example of one worker whose supervisor assumed she would not return to work after a leave because her husband was a doctor and she did not need the money.⁸⁴ The "breadwinner-homemaker" cultural assumption led the supervisor to cancel her health insurance and resist her request to return to work.⁸⁵ Rather than press her legal rights and risk being fired, she avoided confrontation and told him she would not return to work because she lacked child care—an action that no doubt reinforced stereotypes about the lack of job commitment of workers with family responsibilities.⁸⁶ In another case, a male worker turned down opportunities for advancement when he used family care leave to care for his terminally ill spouse based on workplace norms dictating that the ideal worker is someone with no caregiving responsibilities.⁸⁷ His choice,

77. Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y. REV. 11, 41-44 (2005).

78. *Id.*

79. *Id.* at 37-38.

80. *Id.* at 25-27.

81. *Id.* at 29.

82. *Id.* at 42.

83. *Id.* at 41-44.

84. *Id.* at 31.

85. *Id.*

86. *Id.*

87. *Id.* at 33.

as he perceived it, was between pursuing a promotion or caring for his wife.⁸⁸

D. APPLYING LESSONS FROM NEW INSTITUTIONALISM TO FRD

Two important lessons emerge from the above examples and from other new institutionalist accounts of social and legal change. The first is that legal victories—new laws, important court decisions, the EEOC Enforcement Guidance—are not the end points in the process of social change. The microinteraction of individuals in everyday work life may be disrupted and informed by legal changes, but the legal developments themselves do not resolve uncertainty and create organizational isomorphism. Instead, they often produce more uncertainty and heterogeneity of organizational activity. In the case of early Title VII law, the period following passage of the law was marked by tremendous ambiguity as employers, the EEOC, and courts grappled with how far the law should go in protecting workers. Such disorganization invites activists to influence the direction of legal thought and the implementation of organizational routines for adhering to the law.

Dobbin and Kelly's study of how organizations responded to sexual harassment law with practices from Human Resources' professionals' "toolkit" reveals how closely employers attend to the law and how the fear of litigation drives them to implement programs and practices they are not required to adopt.⁸⁹ The authors show that high profile cases and media coverage of such cases makes executives susceptible to novel organizational activities; H.R. professionals provided the issue interpretation and repertoires of solutions that led to new training and grievance programs.⁹⁰ As in the early Title VII cases, intermediaries played crucial roles in determining the extent to which legal changes would result in organizational change.⁹¹ Social movement actors pushed for substantive change in organizational practices, doing away with discriminatory seniority policies and employment testing, while in the case of sexual harassment, H.R. professionals moderated how substantively the law would affect organizational activities.⁹²

Finally, Albiston's work points not to professional or social movement intermediaries as crucial in bringing about change, but to workers themselves.⁹³ Her research shows how everyday interactions between employees and employers reshape the law and give it meaning.⁹⁴

88. *Id.*

89. See Dobbin & Kelly, *supra* note 70, at 1234–37.

90. See *id.* at 1219–20.

91. See *id.* at 1211–12, 1234–37; *supra* notes 65–68 and accompanying text.

92. See Dobbin & Kelly, *supra* note 70, at 1211–12, 1234–37.

93. See Albiston, *supra* note 77, at 16–17.

94. *Id.* at 43–44.

From a social change perspective, then, the lesson learned is that employee awareness of their rights, and public awareness of those rights in general, are crucial in bringing about meaningful change so that workers can transcend rigid cultural norms about the “appropriate” behavior of ideal workers and employ legal or moral frames in obtaining greater rights.

In sum, new institutionalism sends the message that the most crucial work in the cause to create an equitable workplace for employees with family responsibilities is likely just beginning. The EEOC Enforcement Guidance has conferred legitimacy on the social problem and has created opportunities for intermediaries to shape institutional responses. In the hands of professionals such as H.R. managers, we can expect the proposed solutions to be inexpensive and simple—training, internal public awareness campaigns, policy creation. In the hands of activists, the solutions would likely challenge taken-for-granted practices that marginalize caregivers such as the “full-time face-time norm,”⁹⁵ rigid work schedules, inflexible workplace and work time requirements, and mandatory travel.

E. PRESENT INSTITUTIONAL CONDITIONS SURROUNDING FRD

Several common ingredients emerge in institutional accounts of legal and social change. The first is that a social problem must be named and categorized. This has occurred in the case of FRD; the EEOC’s issuance of the Enforcement Guidance on caregiver discrimination is an indicator of the issue’s acceptance as a problem for public attention. A second ingredient is media attention; the media can play an important role in putting pressure on courts and employers to take the problem seriously. The “court of public opinion” is influenced by media accounts of injustices in the workplace. Here too, the issue of FRD is well positioned. Media-savvy activists and public intellectuals such as Sylvia Hewlett, Joan Williams, Joan Blades, and Ellen Galinsky have managed to draw media interest in the issue of women and work for sustained periods of time. And since the passage of the EEOC Enforcement Guidance, the media has experienced bandwagoning surges in its coverage.⁹⁶

A third key ingredient in driving change is engaging the public through new cultural frames that tap into underlying shared values. The intellectual reframing work by Joan Williams which emphasized employees’ rights to parent or care for family members tapped into widely shared civil rights values, while also drawing on cultural and political support for family values. A recent metaphor for engaging the

95. Michelle Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005) (describing the “bundle of related default organizational structures—referred to collectively as the ‘full-time face-time norm’”).

96. See *supra* fig.4 and sources cited note 13.

public with the problem was created by MomsRising activists, with their term “maternal profiling”—which made it into *The New York Times*’ listing of buzzwords, or words “that endured long enough to find a place in the national conversation.”⁹⁷

A fourth factor is the existence of stable alliances or networks for mobilizing and generating collective action. As I described earlier, these networks have only more recently begun to coalesce around the problem of FRD; previously, they were fractured by feminist political groups’ focus on sexual dominance issues; work/family professionals’ programmatic approach and reticence to question underlying normative assumptions of work practices; and competition for limited resources. As the problem has become better articulated, legitimized by the EEOC, and made visible through media coverage, the network linkages have proliferated. This is not to say that once created, networks cannot be dismantled. Networks require repeated interaction, shared values, and common goals to survive.

A final ingredient, which until the release of the EEOC Enforcement Guidance was the weakest in the case of FRD, is the involvement of professionals that serve as issue interpreters and gatekeepers for organizations—in particular, H.R. and corporate counsel. For years, the field of H.R. was resistant to FRD. Since the issuance of the Enforcement Guidance last year, however, H.R. and employment law have devoted considerable attention to FRD—more than 100 articles were subsequently published on the topic, including in such influential professional publications as the Society for Human Resource Management’s *HR Magazine*.⁹⁸

CONCLUSION

Institutional conditions are ideal for affecting real social and organizational change for workers with family responsibilities. Without continued energy and efforts, however, the likelihood of meaningful change is limited. Activists must continue to monitor legal developments; engage in public awareness campaigns; disseminate information to intermediaries such as lawyers, H.R. professionals, and the media; organize collective responses to threats to FRD; and interpret the law for the EEOC and the courts. Such activities require unflagging efforts, sustained resources, and cohesive networks.

97. Posting of Joan Blades to The Huffington Post, *Peaceful Revolution: Maternal Profiling: A New York Times Buzzword*, http://www.huffingtonpost.com/joan-blades/peaceful-revolution_b_78794.html (Jan. 1, 2008, 04:36 PM EST).

98. A search of the Society’s website (<http://www.shrm.org>) using the phrase “family responsibility discrimination” reveals multiple articles on the issue.
